MESSAGE

OF

THE PRESIDENT OF THE UNITED STATES,

ASSIGNING

His reasons for not approving a bill, entitled "An act making an appropriation for deepening the channel over the St. Clair flats, in the State of Michigan," passed at the last session of Congress.

FEBRUARY 2, 1860.—Read, and ordered to be printed.

To the Senate of the United States:

On the last day of the last Congress a bill, which had passed both houses, entitled "An act making an appropriation for deepening the channel over the St. Clair flats, in the State of Michigan," was presented to me for approval.

It is scarcely necessary to observe, that during the closing hours of a session, it is impossible for the President on the instant to examine into the merits or demerits of an important bill, involving as this does grave questions both of expediency and of constitutional power, with that care and deliberation demanded by his public duty as well as by the best interests of the country. For this reason the Constitution has in all cases allowed him ten days for deliberation; because, if a bill be presented to him within the last ten days of the session, he is not required to return it, either with an approval or a veto, but may retain it, "in which case it shall not be a law." Whilst an occasion can rarely occur when so long a period as ten days would be required to enable the President to decide whether he should approve or veto a bill, yet, to deny him even two days on important questions before the adjournment of each session for this purpose, as recommended by a former annual message, would not only be unjust to him, but a violation of the spirit of the Constitution. To require him to approve a bill when it is impossible he could examine into its merits, would be to deprive him of the exercise of his constitutional discretion and convert him into a mere register of the decrees of Congress. I therefore deem it a sufficient reason for having retained the bill in question that it was not presented to me until the last day of the session.

Since the termination of the last Congress, I have made a thorough examination of the questions involved in the bill to deepen the channel over the St. Clair flats, and now proceed to express the opinions which I have formed upon the subject:

And 1. Even if this had been a mere question of expediency, it was, to say the least, extremely doubtful whether the bill ought to have been approved; because the object which Congress intended to accomplish by the appropriation which it contains of $55,000, had been already substantially accomplished. I do not mean to allege that the work had been completed in the best manner, but it was sufficient for all practical purposes.

The St. Clair flats are formed by the St. Clair river, which empties into the lake of that name by several mouths, and which forms a bar or shoal on which, in its natural state, there is not more than six or seven feet water. This shoal is interposed between the mouth of the river and the deep water of the lake, a distance of six thousand feet, and in its natural condition was a serious obstruction to navigation. The obvious remedy for this was to deepen a channel through these flats by dredging, so as to enable vessels which could navigate the lake and the river to pass through this intermediate channel. This object had been already accomplished by previous appropriations, but without my knowledge, when the bill was presented to me. Captain Whipple, of the topographical engineers, to whom the expenditure of the last appropriation of $45,000 for this purpose in 1856 was entrusted, in his annual report of the 1st October, 1858, stated that the dredging was discontinued on the 26th August, 1858, when a channel had been cut averaging two hundred and seventy-five feet wide, with a depth varying from twelve to fifteen and a half feet. He says: "so long as the lake retains its present hight we may assume that the depth in the channel will be at least thirteen and a half feet." With this result, highly creditable to Captain Whipple, he observes that if he has been correctly informed "all the lake navigators are gratified." Besides, afterwards, and during the autumn of 1858, the Canadian government expended $20,000 in deepening and widening the inner end of the channel excavated by the United States. No complaint had been made, previous to the passage of the bill, of obstructions to the commerce and navigation across the St. Clair flats. What then was the object of the appropriation proposed by the bill?

It appears that the surface of the water in Lake St. Clair has been gradually rising, until, in 1858, it had attained an elevation of four feet above what had been its level in 1841. It is inferred, whether correctly or not it is not for me to say, that the surface of the water may gradually sink to the level of 1841; and in that event the water which was, when the bill passed, thirteen and a half feet deep in the channel might sink to nine and a half feet, and thus obstruct the passage.

To provide for this contingency Captain Whipple suggested "the propriety of placing the subject before Congress, with an estimate for excavating a cut through the center of the new channel one hundred and fifty feet in width and four and a half feet deep, so as to obtain from the river to the lake a depth of eighteen feet during seasons of extreme high water, and twelve feet at periods of extreme low water." It was not alleged that any present necessity existed for this narrower cut in the bottom of the present channel, but it is inferred that for the reason stated it may hereafter become necessary. Captain

Whipple's estimate amounted to $50,000, but Congress, by the bill, have granted $55,000. Now, if no other objection existed against this measure, it would not seem necessary that the appropriation should have been made for the purpose indicated. The channel was sufficiently deep for all practical purposes; but from natural causes constantly operating in the lake, which I need not explain, this channel is peculiarly liable to fill up. What is really required is that it should at intervals be dredged out so as to preserve its present depth; and surely the comparatively trifling expense necessary for this purpose ought not to be borne by the United States. After an improvement has been once constructed by appropriations from the treasury it is not too much to expect that it should be kept in repair by that portion of the commercial and navigating interests which enjoys its peculiar benefits.

The last report made by Captain Whipple, dated on the 13th September last, has been submitted to Congress by the Secretary of War, and to this I would refer for information, which is, upon the whole, favorable in relation to the present condition of the channel through the St. Clair flats.

2. But the far more important question is, does Congress possess the power under the Constitution to deepen the channels of rivers and to create and improve harbors for purposes of commerce?

The question of the constitutional power of Congress to construct internal improvements within the States has been so frequently and so elaborately discussed that it would seem useless on this occasion to repeat or to refute at length arguments which have been so often advanced. For my own opinions on this subject I might refer to President Polk's carefully considered message of the 15th December, 1847, addressed to the House of Representatives whilst I was a member of his cabinet.

The power to pass the bill in question, if it exist at all, must be derived from the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The power "to regulate:" Does this ever embrace the power to create or to construct? To say that it does is to confound the meaning of words of well known signification. The word "regulate" has several shades of meaning, according to its application to different subjects, but never does it approach the signification of creative power. The regulating power necessarily presupposes the existence of something to be regulated. As applied to commerce, it signifies, according to the lexicographers, "to subject to rules or restrictions, as to regulate trade," &c., &c. The Constitution itself is its own best expounder of the meaning of words employed by its framers. Thus, Congress have the power "to coin money." This is the creative power. Then immediately follows the power "to regulate the value thereof"—that is, of the coined money thus brought into existence. The words "regulate," "regulation," and "regulations," occur several times in the Constitution, but always with this surbordinate meaning. Thus, after the creative power "to raise and support armies," and "to provide and maintain a navy" had been conferred upon Congress; then follows the power "to make rules for the govern-

ment and regulation of the land and naval forces" thus called into being. So the Constitution, acting upon the self-evident fact that "commerce with foreign nations and among the several States, and with the Indian tribes" already existed, conferred upon Congress the power "to regulate" this commerce. Thus, according to Chief Justice Marshall, the power to regulate commerce "is the power to prescribe the rule by which commerce is to be governed." And Mr. Madison, in his veto message of the 3d March, 1817, declares that "the power to regulate commerce among the several States cannot include a power to construct roads and canals, and to improve the navigation of water-courses, in order to facilitate, promote, and secure, such commerce without a latitude of construction departing from the ordinary import of the terms, strengthened by the known inconvenience which doubtless led to the grant of this remedial power of Congress." We know from the history of the Constitution what these inconveniences were. Different States admitted foreign imports at different rates of duty. Those which had prescribed a higher rate of duty for the purpose of increasing their revenue were defeated in this object by the legislation of neighboring States admitting the same foreign articles at lower rates. Hence, jealousies and dangerous rivalries had sprung up between the different States. It was chiefly in the desire to provide a remedy for these evils that the federal convention originated. The Constitution, for this purpose, conferred upon Congress the power to regulate commerce in such a manner that duties should be uniform in all the States composing the confederacy; and moreover expressly provided that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." If the construction of a harbor or deepening the channel of a river be a regulation of commerce, as the advocates of this power contend, this would give the ports of the State within which these improvements were made a preference over the ports of other States, and thus be a violation of the Constitution.

It is not too much to assert that no human being in existence, when the Constitution was framed, entertained the idea or the apprehension that, by conferring upon Congress the power to regulate commerce, its framers intended to embrace the power of constructing roads and canals, and of creating and improving harbors, and deepening the channels of rivers throughout our extensive confederacy. Indeed, one important branch of this very power had been denied to Congress in express terms by the convention. A proposition was made in the convention to confer on Congress the power "to provide for the cutting of canals when deemed necessary." This was rejected by the strong majority of eight States to three. Among the reasons given for this rejection was, that "the expense in such cases will fall on the United State, and the benefits accrue to the places where the canals may be cut."

To say that the simple power of regulating commerce embraces within itself that of constructing harbors, of deepening the channels of rivers, in short, of creating a system of internal improvements for the purpose of facilitating the operations of commerce, would be to adopt a latitude of construction under which all political power might be

usurped by the federal government. Such a construction would be in conflict with the well known jealousy against federal power which actuated the framers of the Constitution. It is certain that the power in question is not enumerated among the express grants to Congress contained in the instrument. In construing the Constitution, we must then next inquire, is its exercise "necessary and proper?"—not whether it may be convenient or useful "for carrying into execution" the power to regulate commerce among the States? But the jealous patriots of that day were not content even with this strict rule of construction. Apprehending that a dangerous latitude of interpretation might be applied in future times to the enumerated grants of power, they procured an amendment to be made to the original instrument, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The distinctive spirit and character which pervades the Constitution is, that the powers of the general government are confined chiefly to our intercourse with foreign nations, to questions of peace and war, and to subjects of common interest to all the States, carefully leaving the internal and domestic concerns of each individual State to be controlled by its own people and legislature. Without specifically enumerating these powers, it must be admitted that this well-marked distinction runs through the whole instrument. In nothing does the wisdom of its framers appear more conspicuously than in the care with which they sought to avoid the danger to our institutions, which must necessarily result from the interference of the federal government with the local concerns of the States. The jarring and collision which would occur from the exercise by two separate governments of jurisdiction over the same subjects, could not fail to produce disastrous consequences. Besides the corrupting and seducing money influence exerted by the general government in carrying into effect a system of internal improvements might be perverted to increase and consolidate its own power to the detriment of the rights of the States.

If the power existed in Congress to pass the present bill, then taxes must be imposed, and money borrowed to an unlimited extent to carry such a system into execution. Equality among the States is equity. This equality is the very essence of the Constitution. No preference can justly be given to one of the sovereign States over another. According to the best estimate, our immense coast on the Atlantic, the Gulf of Mexico, the Pacific, and the lakes, embraces more than 9,500 miles, and measuring by its indentations and to the head of tide-water on the rivers, the distance is believed to be more than 33,000 miles. This, everywhere throughout its vast extent, contains numerous rivers and harbors; all of which may become the objects of congressional appropriation. You cannot deny to one State what you have granted to another. Such injustice would produce strife, jealousy, and alarming dissensions among them. Even within the same State improvements may be made in one river or harbor which would essentially injure the commerce and industry of another river or harbor. The truth is that most of these improvements are in a great degree local in their character, and for the especial benefit of corporations or indi-

viduals in their vicinity, though they may have an odor of nationality on the principle that whatever benefits any part indirectly benefits the whole.

From our past history we may have a small foretaste of the cost of reviving the system of internal improvements.

For more than thirty years after the adoption of the Federal Constitution the power to appropriate money for the construction of internal improvements was neither claimed nor exercised by Congress. After its commencement in 1820 and 1821, by very small and modest appropriations for surveys, it advanced with such rapid strides that, within the brief period of ten years, according to President Polk, "the sum asked for from the treasury, for various projects, amounted to more than two hundred millions of dollars." The vetoes of General Jackson and several of his successors have impeded the progress of the system and limited its extent, but have not altogether destroyed it. The time has now arrived for a final decision of the question. If the power exists, a general system should be adopted which would make some approach to justice among all the States, if this be possible.

What a vast field would the exercise of this power open for jobbing and corruption! Members of Congress, from an honest desire to promote the interest of their constituents, would struggle for improvements within their own districts, and the body itself must necessarily be converted into an arena where each would endeavor to obtain from the treasury as much money as possible for his own locality. The temptation would prove irresistible. A system of "*log-rolling*" (I know no word so expressive) would be inaugurated, under which the treasury would be exhausted, and the federal government be deprived of the means necessary to execute those great powers clearly confided to it by the Constitution for the purpose of promoting the interests and vindicating the honor of the country.

Whilst the power over internal improvements, it is believed, was "reserved to the States, respectively," the framers of the Constitution were not unmindful that it might be proper for the State legislatures to possess the power to impose tonnage duties for the improvement of rivers and harbors within their limits. The self-interest of the different localities would prevent this from being done to such an extent as to injure their trade. The Constitution, therefore, which had, in a previous clause, provided that all duties should be uniform throughout the United States, subsequently modified the general rule so far as to declare that "no State shall, without the consent of Congress, levy any duty of tonnage." The inference is, therefore, irresistible that, with the consent of Congress, such a duty may be imposed by the States. Thus, those directly interested in the improvement may lay a tonnage duty for its construction, without imposing a tax for this purpose upon all the people of the United States.

To this provision several of the States resorted until the period when they began to look to the federal treasury instead of depending upon their own exertions. Massachusetts, Rhode Island, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia, with the consent of Congress, imposed small tonnage duties on vessels at different periods for clearing and deepening the channels of rivers and

improving harbors where such vessels entered. The last of these legislative acts believed to exist is that of Virginia, passed on the 22d February, 1826, levying a tonnage duty on vessels for "improving the navigation of James river from Warwick to Rockett's Landing." The latest act of Congress on this subject was passed on the 24th of February, 1843, giving its consent to the law of the legislature of Maryland laying a tonnage duty on vessels for the improvement of the harbor of Baltimore, and continuing it in force until 1st June, 1850.

Thus a clear constitutional mode exists by which the legislature of Michigan may, in its discretion, raise money to preserve the channel of the St. Clair river at its present depth, or to render it deeper. A very insignificant tonnage duty on American vessels using this channel would be sufficient for the purpose. And as the St. Clair river is the boundary line between the United States and the province of Upper Canada, the provincial British authorities would doubtless be willing to impose a similar tonnage duty on British vessels to aid in the accomplishment of this object. Indeed, the legislature of that province have already evinced their interest on this subject by having but recently expended $20,000 on the improvement of the St. Clair flats. Even if the Constitution of the United States had conferred upon Congress the power of deepening the channel of the St. Clair river, it would be unjust to impose upon the people of the United States the entire burden, which ought to be borne jointly by the two parties having an equal interest in the work. Whenever the State of Michigan shall cease to depend on the treasury of the United States I doubt not that she, in conjunction with Upper Canada, will provide the necessary means for keeping this work in repair in the least expensive and most effective manner, and without being burdensome to any interest.

It has been contended in favor of the existence of the power to construct internal improvements that Congress have, from the beginning, made appropriations for light-houses, and that upon the same principle of construction they possess the power of improving harbors and deepening the channels of rivers. As an original question, the authority to erect light-houses under the commercial power might be considered doubtful; but even were it more doubtful than it is, I should regard it as settled after an uninterrupted exercise of the power for seventy years. Such a long and uniform practical construction of the Constitution is entitled to the highest respect, and has finally determined the question.

Among the first acts which passed Congress after the federal government went into effect, was that of August 7, 1789, providing "for the establishment and support of light-houses, beacons, buoys, and public piers." Under this act, the expenses for the maintenance of all such erections then in existence were to be paid by the federal government; and provision was made for the cession of jurisdiction over them by the respective States to the United States. In every case since, before a a light-house could be built a previous cession of jurisdiction has been required. This practice doubtless originated from that clause of the Constitution authorizing Congress "to exercise exclusive legislation" * * "over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, maga-

zines, arsenals, dock-yards, and other *needful building*." Among these "*needful buildings*," light-houses must in fact have been included.

The bare statement of these facts, is sufficient to prove that no analogy exists between the power to erect a light-house as a "needful building," and that to deepen the channel of a river.

In what I have said I do not mean to intimate a doubt of the power of Congress to construct such internal improvements as may be essentially necessary for defense and protection against the invasion of a foreign enemy. The power to declare war and the obligation to protect each State against invasion clearly cover such cases. It will scarcely be claimed, however, that the improvement of the St. Clair river is within this catagory. This river is the boundary line between the United States and the British province of Upper Canada. Any improvement of its navigation, therefore, which we could make for purposes of war would equally enure to the benefit of Great Britain, the only enemy which could possibly confront us in that quarter. War would be a sad calamity for both nations; but should it ever unhappily exist, the battles will not be fought on the St. Clair river or on the lakes with which it communicates.

JAMES BUCHANAN.

WASHINGTON CITY, *February* 1, 1860.